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90-1346

No.

Supreme Court, U.S.
FILED
JAN 4 1991
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IN THE SUPREME COURT OF THE UNITED STATES

GENNIE DARYL KING,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Erskine R. Mathis
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QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the Petitioner's Motion to Suppress the results of his illegal search and seizure was properly denied.

2. Whether the Court of Appeals erred in affirming the trial courts increasing of the defendant's sentence by refusing to grant credit for acceptance of responsibility and adding points for obstruction, when no evidence of obstruction was educed.

CERTIFICATE OF INERESTED PERSONS

The undersigned counsel of record for the appellant certifies that the following persons are interested in the outcome of this case:

United States Attorney's Office
AUSA John C. Earnest, Jr.
1800 North 5th Avenue
Birmingham, Alabama 35203

The Honorable U.W. Clemon
United States District Judge
Northern District of Alabama
Federal Courthouse
1729 North Fifth Avenue
Birmingham, Alabama 35203

Mr. Gennie Daryl King
No. 17149-001
FCI Talladega
Renfroe Road
Talladega, Alabama 35160

Mr. Erskine R. Mathis
Attorney for Appellant
1117 22nd Street South
Birmingham, Alabama 35205

By: _____
Erskine R. Mathis
Attorney for Appellant

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CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

1. The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be siezed.

2. The Fifth Amendment to the United States Constitution provides in pertinent part: "No person shall . . . be deprived of life, liberty, or property without due process of law . . .".

3. Title 21 U.S.C. Section 841 is too voluminous to be presented herein. Therefore it is contained in its entirety, in the appendix. (infra p. 13).

4. United States Sentencing Commission, Guidelines Manual, Section 3C1.1 and commentary is to voluminous to be presented herein. Therefore, it is contained in its entirety, in the appendix. (infra p.20).

5. United States Sentencing Commission, Guidelines Manual, Section 3E1.1 and commentary is to voluminous to be presented herein. Therefore, it is contained in its entirety, in the appendix. (infra p.22).

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

NO.

GENNIE DARYL KING, PETITIONER

V.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Erskine R. Mathis, Attorney for the Petitioner, Gennie Daryl King, respectfully petitions this Honorable Court on behalf of the Petitioner, for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

There were no opinions filed in this case by the Court of Appeals or the District Court, however, there are two opinions by the United States Magistrate; one entitled Magistrate's Report and Recommendation, which is set out infra, p. , and the other Magistrate's Supplemental Report and Recommendation, which is set out infra, p. Defense Objections To Magistrates Report and Recommendations, is set out infra, p. . The judgment of the Eleventh Circuit Court of Appeals is set out infra, p. . The judgment of the District Court is set out in the appendix, infra, p. .

JURISDICTION

Defendant was indicted on June 30, 1989, on one count of violation of Title 21 U.S.C. 841 (a)(1), possession with intent to distribute a controlled substance (cocaine). Three separate suppression hearings were held regarding the traffic stop and the illegal

search. Each time, the court denied the Motion to Suppress. The last suppression motion was held immediately prior to trial. On the trial court's adverse ruling the defendant entered a plea of guilty, on September 9, 1989. Defendant was sentenced on December 15, 1989, to the custody of the Bureau of Prisons for one-hundred twenty (120) months, five years (5) on supervised release, assessed a $50.00 fee, but no fine and costs, noting the defendant was indigent.

Defendant filed notice of appeal on December 20, 1989, and the conviction was affirmed without written opinion on August 14, 1990. Defendant then filed a Petition For Rehearing which was denied without opinion on October 31, 1990.

This Petition for a writ of certiorari is brought pursuant to T.28 U.S.C. Section 1254(1).

STATEMENT OF THE CASE

On June 10, 1989, at about 2:00 p.m., Birmingham Police Officers E.W. Clements and Carlos Owen were on partol in the Ensley area of Birmingham, on 14th Street and Avenue F. They observed a maroon and black Samurai Suzuki being driven by the defendant but owned by another man named Broderick Thomas (R3-40). Officer Owen had previously stopped the Suzuki and issued Thomas warnings for no valid drivers license. (R3-39 & 40). The front of the Suzuki bore a license plate with the words "Brods Samurai". (R4-46). The officers testified the Suzuki was stopped because the driver failed to give a right hand signal as provided for in the Code of the City of Birmingham 10-8-35. (R8-8). Officers turned on the blue lights on their vehicle and stopped the Suzuki at approximately 14th Stree and Avenue I. Officer Clements, sitting on the driver's side of the patrol car, radioed in theri position and requested a check of the license tag. Clements observed the defendant

looking at him in the rear view side mirror of the Suzuki. As Clements radioed for information, his partner, Officer Owen approached the passanger side of the Suzuki and took up a protective surveillance point, behind and to the side of the passanger window. Officer Clements finished his radio call and exited the patrol car and defendant exited the Suzuki. As the defendant exited, officer Owen said he observed the defendant either knock or dislodge a small shoe box which fell from the console onto the passanger side floor board of the Suzuki. Owen said the lit of the box fell off and Owen said he observed a clear plastic bag containing what he said appeared to be cocaine. The passanger in the Suzuki, a Ms. Marvalyn Whatley jumped out of the vehicle hollering "I don't know what it is. It's not mine." At that time, Officer Owen reached into the vehicle and seized the white powder. Later tests showed it was cocaine hydrochloride. Owen informed his partner Clements what he found and

arrested the defendant and Ms. Whatley, placing them both in the patrol car. The Suzuki was searched and $5,950.00 was found in the console. Ms. Whatley was subsequently released after being charged with no valid state drivers license.

ARGUMENT

This appeal involves one or more questions of exceptional importance:

THE SHAM TRAFFIC STOP AND ILLEGAL SEARCH

Whether we, as a nation, should be forced to undergo random traffic stops and searches of our automobiles at the whim of individual police officers for no reason, other than the officers desire to see what he may find in the automobile. This problem pervades certain low income areas of Birmingham, and probably most major cities in the country.

Why should I call it a problem? It is certainly not a thing I have to deal with in my own day to day experience. I would submit it is not something that any member of the bar

or other professional group has to deal with other than in extreme instances.

If it does not happen to us then why should it and how could it be happening to poor people, especially poor black people in the inner cities? Because we look the other way. Judges habitually look the other way and bend over backward to accept what the police say as true, and what the defendant's say as lies.

That is exactly what occured here. The police stopped appellant's automobile for the sole purpose of searching it. The plan was simple and one followed by most police forces in the country. If you do not find anything, no one is hurt and the people stopped will be so glad they did not get arrested or receive a ticket that they will not say anything. If they do say anything it will be all right because they will not be believed. The officers have confined their stop to poor, undereducated, politically bankrupt sections of the community where the rich and the

powerful do not go.

If the officer does find anything, he justifies the search by saying he stopped the individual because of some traffic infraction, then, in the course of writing the ticket saw contraband in plain view. Officers never find contraband without a warrant if it is not in plain view. The plain view doctrine, Coolidge v. New Hampshire, 403 U.S. 443 (1971), is one of the most abused and misused tools in law enforcement's arsenal.

How long can responsible members of the bar continue to let this go on. It is not the successes of the abuse which cause the community a problem, it is the failures. Imagine how many of these sham traffic stops and searches have to be conducted before contraband is found.

Would we put up with it in our own communities? Certainly not! Then why are we so quick to put up with it in the poorer less fortunate ones?

The police will never do better if we do

not start using our eyes, and our minds, and calling a spade a spade. Every time we look the other way, the officers who are aware of the case become more emboldened and the policy becomes more engrained and sanctioned by the courts. The police would not do these things if they thought for one minute we cared enough to hold their testimony to the same scrutiny we hold other witnesses.

In the case at bar, the officers story is unworthy of belief. It was proved a lie through photographs and testimony. A young lawyer, not a party and not representing a party testified that on examination of the automobile in question the contraband could not have been where the officer testified it was. The police officer was caught in a story which he could not get out of. What was the trial court's solution? A gentle suggestion to the officer as to his proper course.

THE COURT: So you could be wrong?

A: I could be wrong--

THE COURT: As to exactly where it was?

A: -- as to exactly where it was, because it just happened so fast.

This suggestion by the court occured during the third suppression hearing in this case. Either this concession, orchestrated by the court, had to be accepted by the officer, or the evidence had to be suppressed.

The court went on to find that all the defendant's witnesses were unworthy of belief. They all testified that the officer reached under the drivers seat and pulled a shoe box out, lifted the cover from the box and found the contraband. The one exception the court made regarding a witness of the defendant was the young lawyer, Marco Gonzales. The court found his testimony to be the truth. The court also found the police officers testimony to be true. That defies common sense. Gonzales testimony, if true, cannot support a finding of the officers testimony as truth.

A careful perusal of the record will reveal many instances wherein the officer was caught and had to hedge on his story. Gonzales never hedged. He took photographs to

prove his point and they were introduced as evidence and are a part of the record.

Sham traffic stops are illegal and this Court has so stated in a number of cases. United States v. Smith, 799 F.2d 704, (11th Cir. 1986), United States v. Miller, 821 F.2d 546, (11th Cir. 1987), United States v. Bates, 840 F.2d 858, (11th Cir. 1988), United States v. Hardy,
855 F.2d 753 (11th Cir. 1988). The inquiry prescribed by this line of cases concerning pretextual seizure is "Whether a reasonable officer would have made the seizure in the absence of illegitimate motivation. In the case at bar, it is highly unlikely that the officers would have even stopped the automobile driven by defendant for only failing to give a turn signal.

Does the fourth amendment to the United States Constutution mean so little that the police can get around it with such a flimsy story? Has the burden of proof in narcotics cases shrunk to the point of being any cock

and bull story which the police tell which, when taken in its best light furnishes probable cause? Are we no longer charged with using our common sense to determine truth? In these type cases is it the defendant who must prove his innocence? That would appear to be the case.

A "Terry stop" cannot be used as the basis of a "full search" that would normally be warranted only by the existence of probable cause, consent or a valid arrest. Terry v. Ohio, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). So, going under the passanger seat, pulling out the shoe box and opening it, are clearly illegal and shold not be condoned. U.S. v. Place, 462 U.S. at 706, 103 S.Ct. 2644.

SENTENCING

Defendant was sentenced December 15, 1989, and as part of the sentence imposed, the trial Court, on its own motion, gave the Defendant an additional two points for obstruction of justice (R5-9) and refused to

give the defendant credit of two points for acceptance of responsibility. (R5-20).

On the trial court's own motion, it decided to hold the defendant liable for obstruction of justice. This is true even though the arresting officers, the government, and the United States Probation Office were all silent as to any obstruction on the part of this defendant. The Court stated it was basing its addition of two points for obstruction on a statement police said the defendant made to them while in the police car headed for jail. He is alleged to have said, " Can you not keep that and let me go?" (R3-15). According to the Guidelines Section 3C1.1 Commentary 2, this provision should be applied by evaluating the suspect testimony and statements in a light most favorable to the defendant. It is entirely possible the defendant was only engaged in wishful thinking rather than an outright, willful attempt to bribe the police into letting him go.

Even though the government (R5-15)

recommended to the Court that the defendant be granted two points for acceptance of responsiblity as manifested in the record (R4-138), the trial judge chose to deny the defendant the points. The Court cited as part of his reasons that the defendant agreed to plead guilty only after the case had been called for trial and at the point of calling a jury. (R5-17). The trial court neglected to take into consideration Title 28 U.S.C. section 944(a) Federal Sentencing Commission Guidelines Section 3E1.1(b), which reads:

> "A defendant may be given consideration under this section without regard to whether his conviction is based upon a guilty plea or a finding of guild by the Court or jury or the practical certainty of conviction at trial."

If the defendant clearly demonstrates a recognition and affirmative acceptance of personal responsibility for the offense of conviction... Section 3E1.1(a)

In the case at bar, the defendant plead guilty immediately after an adverse ruling on his

third suppression hearing. This was immediately before a jury was called. The suppression hearing was an exercise of the defendant's right to be free from unreasonable searches and seizures and yet it would appear from the trial court's comments that his exercise of that right precludes him from credit for acceptance of responsibility.

> Section 2E1.1, Commentary 2 says: "Conviction by trial does not preclude a defendant from consideration under this section. A defendant may manifest a sincere contrition even if he exercises his constitutional right to trial. This may occur, where the defendant goes to trial to preserve issues that do not relate to factual guilt (e.g. to make a constitutional challenge to a statute or a challange to the applicability of a statute to his conduct.)"

In the transcript of the September 9, 1989 hearing before the trial court (R4-138) the defendant was asked directly by the trial court if the cocaine was in the car the defendant was driving. The defendant answered "yes". The court then asked if the defendant knew the cocaine was in the car. The defendant again answered "yes".

It is difficult to imagine a clearer acceptance of responsibility for a crime than to stand in a courtroom before a federal judge in the presense of the U.S.Attorney and a court reporter and admit the two elements of the indictment. Any requirement of a manifestation of acceptance of responsibility beyond what this defendant did is contrary to law and common sense.

In addition to everything else, if judges are going to treat defendant's who plead guilty in this rough handed and cavalier fashion, why should any criminal defendant even consider a plea. This particular defendant could not have received any worse treatment if he had gone to trial and been convicted.

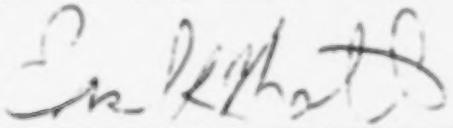
by: _____
Attorney for appellant

CONCLUSION

Based on the foregoing facts and case law

the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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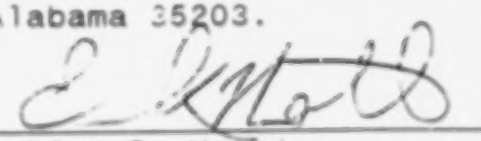
CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing on opposing counsel by U.S. Mail, this the 26th day of December 1990, by mailing a copy to John C. Ernest, Jr., Assistant U.S.Attorney, 1800 North 5th Avenue, Birmingham, Alabama 35203.



Erskine R. Mathis